

Frequently Asked Questions (FAQs) and Answers on EXCEPTIONS, WAIVERS AND VARIANCES (EWV)

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Note the term Appointing Authority (AA) as used in this FAQ refers to the person or entity that is required by law to provide an interpreter as an accommodation. It may be a court, doctor, hospital, business, or any other entity that is required to provide equal communication access to all members of the public.

EWV 1) With the new rules in addition to the Deaf Persons' Interpreters Act, am I now *guaranteed* a qualified interpreter every time I need one?

Unfortunately, no. It is absolutely true that the law says that you are entitled to, and must be provided with, a qualified interpreter. However, no law or rule can guarantee that a qualified interpreter will be available whenever one is needed. This is a greater problem in some areas of the state than in others, but no matter how many qualified interpreters there are in a community, there is always the possibility that there will be times when there is a need for one more than is available. Therefore, the Michigan law and rules define the minimum qualifications an interpreter must have in order to be considered qualified in a particular setting, and then require Appointing Authorities (AA) to provide an interpreter who meets the qualifications. But because they recognize that there will be instances when it will be impossible for an AA to do so, the law/rules also provide instruction on the AA's legal responsibility when they are legitimately unable to provide a qualified interpreter.

While interpreter availability is often thought of as a rural problem, it can occur anywhere. When the problem is predictable, as in a small northern community where the nearest interpreter lives several cities away, an Appointing Authority should take this into account and begin looking for an interpreter immediately upon being notified that one is being requested. Still, even where interpreters are plentiful, they may all be previously committed at the time they are needed. The lack of an available qualified interpreter may also occur when interpreters are available, but they lack required credentials - for instance, if no one available is qualified as a level II medical interpreter, which a doctor's office is required to provide.

Unfortunately, while it may occur through no fault of the Appointing Authority, it is also true that a d/db/hh person may not get the qualified interpreter that he or she is legally entitled to because the Appointing Authority does not do what the law and rules require. The rules provide a complaint and investigation process that is used to determine whether, in a particular instance, a failure to provide a qualified interpreter was the result of an Appointing Authority's own actions or inactions. If it is, Appointing Authority will be found to be legally responsible for **violating** the rules.

Regardless of whether or not it is to blame for its failure to provide a legally required qualified interpreter, the rules also provide the framework for what the Appointing Authority must do instead. An Appointing Authority is required to provide whatever reasonable accommodation will establish the most effective communication possible under the circumstances. A failure to do so also constitutes a **violation** of the rules.

However, when an Appointing Authority has met its legal obligations, and an accommodation other than a qualified interpreter is provided in compliance with the applicable laws and rules, the accommodation is considered to be provided in **variance** to the qualification requirement.

EWV 2) What are variances?

Variances are essentially those situations in which the ADA and/or other laws permit an alternate accommodation to be used instead of the qualified interpreter that would otherwise be legally required.

Whenever the law requires a qualified interpreter to be provided, there are only three possible outcomes: (1) a qualified interpreter will be provided, (2) some other accommodation will be provided in "variance" of the rule but in a way that is legally permissible under the circumstances, or (3) the law will be violated. The term variance broadly applies to every instance in which an Appointing Authority **LEGALLY provides an accommodation that is less than the one the law would otherwise require.**

A variance usually takes place when an appointing authority maintains that, for a legally valid reason, it is not able to provide a fully qualified and/or effective interpreter. Most frequently the authority asserts that this is because no qualified interpreter is available. Because there will be always be instances when it will be impossible to provide a qualified interpreter at the time and place that one is needed, disability law has always provided that an Appointing Authority who does everything it reasonably can to ensure that a d/db/hh

person is provided the most effective accommodation possible under the circumstances is meeting its legal burden.

When an Appointing Authority cannot provide a qualified interpreter but is able to demonstrate that it **did everything it reasonably could to provide the best accommodation possible under the circumstances**, it will have acted in **variance** of the Michigan rules. If it cannot do so, it will have acted in violation of the rules.

EWV 3) What must be done so that a need to act in variance of the rules does not become a violation of the law?

Simply put, the **first step** requires an Appointing Authority to **do everything reasonably possible to provide a qualified interpreter**, and it must do so **every time** an interpreter is required to be provided.

An Appointing Authority must always make **timely efforts** to secure a qualified interpreter. Determining what timely means in a particular case will depend on the specific facts, but timely usually means that the process begins when an appointment is made or an interpreter request is received. There are also places, like hospital emergency rooms, where it is not reasonable to wait for a request or appointment, and there must be provisions made to ensure interpreter availability at all times.

No variance, waiver, or exception can cure a failure to take reasonable and timely steps to provide a qualified interpreter. These processes are *only* about how to proceed *after* all appropriate efforts have been made and there is no reasonable way that a qualified interpreter can be provided.

One way Appointing Authorities sometimes fail to take all reasonable steps to locate a qualified interpreter is through an inappropriate reliance on an **interpreter agency**. Working with an agency can be a great asset and timesaver, but if the agency only works with a percentage of local interpreters, relying on it solely will not constitute a reasonable effort when they report that no interpreter is available. **It is not ok to provide an underqualified interpreter because a particular agency's qualified interpreters are unavailable.** The law requires that all reasonable efforts be taken to locate a qualified interpreter, which includes checking the availability of interpreters who work for other agencies or freelance.*

While not mandated by the rules, an Appointing Authority is strongly advised to document all requests for an interpreter and subsequent efforts to provide one. This practice is the best way the AA can later show that its efforts to locate a qualified interpreter were timely and adequate should those efforts later be challenged.

* Note: Nothing prevents an agency from assuming an Appointing Authority's legal obligation, including the obligation to check the availability of other interpreters. However, unless an agency unambiguously contracts to act as the Appointing Authority's agent and accept its legal responsibility to comply with the law when doing so, the Appointing Authority is legally responsible for ensuring all reasonable efforts to locate a qualified interpreter are made.

EWV 4) Is there something else that must be done so that the need to act in variance of the rules does not become a violation of the law?

Variance is a two part (or two step), process. First, as described above, an Appointing Authority is required to establish that a variance is necessary because it is unable to provide a qualified interpreter. The **second step** is properly determining what accommodation to provide instead.

When a required accommodation is impossible, the most effective accommodation that is possible becomes legal standard that is required. Thus, **if a qualified interpreter cannot be provided, an Appointing Authority must then provide the most effective communication possible.** A variance will not violate the law if this duty is met. In these situations the appointing authority pays for whatever accommodation they do provide.

An Appointing Authority should engage in an interactive process with a d/db/hh person to determine the best available alternative for that individual. The only way to determine what will be most effective for a particular deaf, deafblind or hard of hearing person is to ask that person. Obviously, it is best if this takes place in advance of the date for which an interpreter is requested. This will not only provide the Appointing Authority with the time to meet the person's needs, it may also permit the discussion to take place over the phone using Video Remote Interpreting, by email, or by other means. If an agreement on the best way to proceed can be reached, a partial waiver (see below) can be used to document the agreement on the alternative accommodation that will provide the most effective communication possible under the circumstances.

However, there is no legal requirement that a d/db/hh person agree to accept a particular alternate accommodation. Ultimately, the lesser accommodation that is provided is whatever the Appointing Authority determines will reasonably provide the most effective communication possible under the circumstances. If a d/db/hh person believes the alternate accommodation that was provided was less effective than one that could reasonably have been provided instead, he or she has the right to file a complaint alleging that what the Appointing Authority claims to be a variance is actually a violation of law. A formal waiver or other similar agreement simply indicates that the parties who sign it agree on the accommodation to use under existing circumstances. Whether they do it in writing or not, a d/db/hh person who agrees on how to proceed because circumstances exist that prevent using a qualified interpreter is not waiving his or her right to have had a qualified interpreter in the first place. The Appointing Authority may still be legally responsible for causing the circumstances that created the need to agree on an alternative accommodation.

Essentially, a variance is no different than classic disability accommodation law, where the person entitled to an accommodation can both make the best of what is being offered based on existing circumstances, and then bring an action for failure to ensure that a qualified interpreter was one of the choices provided.

EWV 5) What are exceptions?

Exceptions are used only in a school setting. The exceptions process does not formally begin until the 4.0 EIPA standard goes into effect on Aug. 31, 2016 (Rule 27(3)). Until then, in both elementary and secondary settings, interpreters must possess an EIPA certification

indicating a performance score of not less than 3.5 or standard level 2, standard level 3, or a Michigan BEI I. A school unable to meet the requirements is in essentially the same position as in the past: it proceeds in variance of the rules knowing it could be sued and thus documenting its efforts to comply and its efforts to work with parents to determine the best way to proceed when compliance is not possible.

A school can seek an exception when it believes it cannot provide a fully qualified classroom interpreter. These exceptions for schools are the **only** situation in which the Division makes an advance determination that the unfeasibility of finding a fully qualified interpreter necessitates a variance from a minimum qualification rule. As in any instance where an interpreter is a legally required accommodation, the only justifiable reason for providing an exception to the rule is that doing so is a true necessity.

Before granting a school a variance the Division will require the school to provide written description of its attempts to locate a properly qualified interpreter. These efforts will need to include things like a description of when and where the job was posted; what information it contained; whether the DODDBHH listing of certified interpreters was consulted and listed interpreters were contacted; whether any, deaf, deafblind, hard of hearing, sign language interpreter groups, interpreter agencies, and/or interpreter training programs were contacted and provided information about the positions; and whether the school is offering a salary sufficient to constitute a “reasonable effort” to secure a fully qualified interpreter.

After the 4.0 standard takes effect September 1, 2016, schools that can establish the necessity to do so may obtain an exception from the Division on Deaf, Deafblind and Hard of Hearing allowing them to retain interpreters who meet the current 3.5 standard and are actively engaged in improving their skills. If a school is still unable to find an available interpreter who meets the standards required by the exception, the school will need to determine the best available alternative accommodation, while effectively on notice that the decision will be subject to later legal review.

EWV 6) What are waivers?

Waivers refer to when a d/db/hh person voluntarily gives up (waives) their right to a particular accommodation by agreeing to accept a different accommodation. This can occur in any number of situations, but it is always about a d/db/hh person being given the opportunity to express their own conclusion about what would be the most effective accommodation under existing circumstances.

Waivers are about choice. A person cannot voluntarily “waive” the right to something that is already being denied. A d/db/hh person who is genuinely provided with more than one choice of how to proceed, ‘waives’ their right to later claim they should have been provided with the other choice (or one of the other choices).

There are two **very different** types of waiver. However, in both cases it is critical to understand that **the intent and purpose of any waiver is to document the d/db/hh person’s choice.**

EWV 7) What is a full waiver?

A full waiver is appropriate when an appointing authority offers to provide a fully qualified interpreter and a d/db/hh person requests a different accommodation instead which they state will better enable them to effectively participate in communication. A full waiver is used **only** when a variance is taking place **at the request of the d/db/hh person**, who by demanding on an accommodation other than a qualified interpreter is waiving their opportunity to receive the accommodation the rules require.

The classic example of when a full waiver is appropriate is when a d/db/hh person insists upon having a non-certified friend or family member interpret even though the family member is not qualified under Michigan law. There may be appropriate reasons for making such a choice, (a unique form of signing or otherwise communicating), or it may be made for inappropriate reasons (like the desire to see payment go to a family member rather than a qualified interpreter), but it is nonetheless the d/db/hh person's choice to make.

The rules are drafted to facilitate a d/db/hh person's ability to choose in appropriate instances, but also to discourage situations where the goal is something other than maximum communication access. For this reason, an appointing authority may, but is **not required, to compensate an unqualified or underqualified interpreter** who they did not choose. The **only time** that it is appropriate for an Appointing Authority to decline payment to an interpreter is when that interpreter is being selected instead of a qualified interpreter that the AA is prepared to provide.

In many instances, especially when there may be legal liability involved, the AA will still wish to retain (and pay for) the services of a qualified interpreter to serve their own interests in effective communication. Not being required to pay for the alternate interpreter prevents them from having to pay for both. This provision is also intended remove the financial incentive for persons to fraudulently create situations requiring an interpreter for the purpose of securing payment for a particular interpreter or agency.

The option of not paying an interpreter is therefore available only when an Appointing Authority believes the interpreter does not meet the legal requirement of establishing the most effective communication possible. An Appointing Authority may agree to pay the alternate interpreter if it agrees that doing so will establish effective communication, or it may decline to pay the alternate interpreter, but only while also continuing to provide (or at least offer to provide) and pay a qualified interpreter.

The Division on Deaf, DeafBlind and Hard of Hearing has developed a [full waiver form](#) that may be used to document the understanding of an Appointing Authority who is prepared to provide a qualified interpreter and a d/db/hh person who desires a different accommodation. A version of the form that can be filled in electronically and printed for signatures is on the Division's website.

EWV 8) What is a limited waiver?

A limited waiver is just what it sounds like: an agreement in which a d/db/hh person indicates that they are waiving the right to later claim that a specified action violated his or

her rights. The interpreter rules limit the effect of such waivers to only an Appointing Authority's present or future acts.

Therefore **a limited waiver is documentation that because present circumstances prevent utilizing a qualified interpreter, a d/db/hh person elects one particular alternate accommodation from those being offered.** A typical example is when a qualified interpreter cannot be provided at the time set for an appointment and the d/db/hh person is given the options of rescheduling the appointment, proceeding with an underqualified interpreter, or proceeding with written communication. A limited waiver in this instance would indicate which of the three options the d/db/hh person chooses, and would waive his or her right to later claim that one of the other options offered would have provided more effective communication. The appointing authority is still required to properly compensate the interpreter (or pay for an alternate accommodation) in such a situation.

The rules specifically provide that **a limited waiver does not waive a d/db/hh person's right to later claim that and Appointing Authority failed to meet its legal duty to provide a qualified interpreter** during the period prior to the waiver being made – by creating the situation that forced the choice of alternate accommodations. For example, if the appointment and request for an interpreter had been made a month prior to an appointment but the Appointing Authority had not attempted to find an interpreter until the day before, a limited waiver would document what the d/db/hh person agrees is the best option under the circumstances, but it would not limit the AA's legal responsibility or liability for creating the circumstances by failing to act reasonably and make a timely effort to secure a qualified interpreter.

A limited waiver is therefore part of the interactive process that should take place whenever a required accommodation cannot be provided. Whenever an AA recognizes that it will be unable to provide a qualified interpreter, it should contact the person requesting the accommodation and begin the process of determining how best to achieve effective communication. A limited waiver documents this process, and protects the parties while moving forward in an effort to provide the best accommodation possible. If no agreement can be reached, the Appointing Authority will have to decide what alternative to proceed with on its own, and should document what attempts were made. This type of waiver does not waive any wrongdoing that may have led to the creation of the situation where nobody was available; it only indicates that there was an interactive process where it was agreed this was the best way to proceed given the present facts.

The Division on Deaf, DeafBlind and Hard of Hearing has developed a [limited waiver form](#) that may be used to document the understanding of an Appointing Authority who is offering several options as alternate accommodations in lieu of a qualified interpreter and a d/db/hh person who is indicating which of the options will provide him or her with the most effective communication under the circumstances. A version of the form that can be completed electronically and printed for signatures is available on the Division's website.

EWV 9) Can an interpreter work in a proceeding for which they are underqualified without violating the law or the interpreter Code of Ethics?

The Michigan rules prohibit an interpreter from interpreting at a proceeding that requires a certification level they do not possess, as does the interpreters' Code of Professional Conduct. Both the legal and ethical rules state that an interpreter who does so is accountable for the violation and subject to discipline.

On the other hand, as has been established above, there are times when a less than fully qualified interpreter can be utilized if it is not possible to provide one who is fully qualified. If any interpreter is going to be willing to participate in such legally-permissible situations, he or she cannot then be subject to discipline for doing so, nor can they be held responsible for failing to interpret at a skill level above their actual qualifications. The rules therefore permit interpreting at a proceeding without being fully qualified, but only with the knowledge of the parties and only if the interpreter is the most effective accommodation that can be provided. An individual interpreter cannot, however, be certain that he or she is indeed the most effective interpreter available, because there is no realistic way they can verify the Appointing Authority's assertions about the unavailability of other interpreters. The legal responsibility to provide a qualified interpreter is placed solely upon the Appointing Authority, and it is the Appointing Authority who is accountable for any failure to meet its legal duty, first in its attempt to secure a fully qualified interpreter, and second to properly consider other alternative accommodations that may have offered more effective communication.

While an interpreter is not legally obligated to ensure an Appointing Authority has actually met its duty to provide a proper accommodation, he or she is legally obligated to ensure that the Appointing Authority is representing that it has done so. An interpreter who is asked to interpret at a proceeding for which he or she is not properly qualified should, prior to agreeing, **demand the Appointing Authority attest that it made all reasonable efforts to secure a qualified interpreter, and after failing to do so, it determined that the interpreter being provided was the most effective accommodation possible.** In other words, an interpreter who is not fully qualified must insure that the Appointing Authority accepts any legal responsibility for failing to provide a fully qualified interpreter.

Before interpreting at a proceeding for which he or she is not properly qualified, an interpreter **also must ensure that all parties know what qualifications should be required for the proceeding, the interpreter's actual qualifications, and that any party may halt the proceedings if communication is not effective.** The best way to document that the parties have a common understanding in this regard is if they sign a written waiver, but regardless of whether a d/db/hh person has formally agreed on how to proceed in the absence of a qualified interpreter, an interpreter is always responsible for ensuring the d/db/hh person is aware of what is taking place.

The rules do not require that an Interpreter get an Appointing Authority's acknowledgement of its legal responsibilities in writing, but doing so is recommended as a best practice. Not only does a written document (or statement on the official record when applicable) protect the interpreter, proper documentation of a variance establishes that appropriate procedures were followed and that there is a common understanding of who is accountable otherwise.

The Division on Deaf, DeafBlind and Hard of Hearing has developed an [Acknowledgment of Responsibility](#) form that may be used to document the understanding between an interpreter who lacks proper certification for a proceeding, and an Appointing Authority who has determined the interpreter will provide the most effective communication possible under the circumstances. A version of the form that can be filled in electronically and printed for signatures is available on the Division's website.